Lye Pong Fong v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-16 OF 1997
SURIYADI J
2 JUNE 1998

Criminal Procedure *— Autrefois convict — Whether amount to — Appellants under restrictive residence order by Minister for involving in illegal gambling — Appellants charged for same offence within the span of period of those restrictive orders — Whether charging of appellants tantamount to them being tried again for same offence and disallowed by rule of double jeopardy — Whether appellants had been sentenced and convicted — Whether Minister a competent criminal court — Criminal Procedure Code (FMS Cap 6) ss 2, 6 & 173(m)*

The appellants had been involved in activities relating to illegal gambling and were ordered to be restricted in the district of Bidor by the Minister under the Restricted Residence Act 1933. Inspite of those orders having been made, the appellants were charged for carrying out illegal gambling activities on 19 March 1994 which came within the span of period of those restrictive orders. The appellants filed objections on the premise that as they had been dealt with by the Minister, the defence of autrefois convict applied. The objections were rejected by the magistrates. The appellants appealed. The issue was whether the charging of the appellants based on the incident of 19 March 1994 tantamount to them being tried again for the same offence and disallowed by the rule of double jeopardy.

Held, dismissing the appeals:

(1) A restrictive residence order cannot be equated with that of a detention order. Similarly, a restrictive order cannot constitute an imprisonment order in any relevant sense. For an imprisonment order to be valid, a prior conviction will have to take place, which entails the fulfilment of all the pre-conditions laid down in the Criminal Procedure Code (FMS Cap 6) ('the Code'). Under s 173(m) of the Code, prior to a conviction there should be an adjudication or finding of guilt and sentence. A restrictive residence order will never qualify as a conviction. If no conviction has been recorded, then it follows that the issue of double jeopardy does not arise at all, as in the present case. Further, such conviction must be pronounced by a court. It is clear under the provisions of ss 2 and 6 of the Code that a Minister is not a competent criminal court (see pp 308G, H, I and 309A–B, F).

(2) As the appellants could not be said to be in double jeopardy, the courts therefore were at liberty to pursue and deal with the prosecution. Apart from that, it is trite that the Public Prosecutor has a wide discretion to institute any prosecution by virtue of the powers conferred on him by s 376 of the Code and art 145(3) of the Federal Constitution. On those premises, even though the appellants were prejudiced by that prosecution, as per those charges, the Public Prosecutor's choice to act against them was

not an arbitrary action based on discriminatory law. By reason of the prosecutor's wide discretion conferred on him by the Constitution, the ruffled sensitivities of the appellants will have to be subservient to those prerogatives (see p 311D–E, G–H).

(3) The prevailing laws regarding the Public Prosecutor's power to act against a law breaker, or for that matter the specific Act under which the appellants were charged, are not based on laws that are discriminatory. Whatever executive decision he undertakes will depend in a large way on the available evidence before him or for some other good reasons. It never has been the judicial view that by virtue of the vast powers conferred on the Public Prosecutor and which eventually prejudices a wrongdoer, an effect which flows from that prosecution, that law is construed as discriminatory and therefore bad (see pp 311I and 312A, C–D).

[Bahasa Malaysia summary

Perayu-perayu telah terlibat dalam aktiviti-aktiviti berkaitan dengan perjudian haram dan diarah untuk diterhadkan di daerah Bidor oleh Menteri di bawah Akta Kediaman Terhad 1933. Walaupun perintah itu telah dibuat, perayu-perayu dipertuduhkan kerana menjalankan aktiviti perjudian haram pada 19 Mac 1994 yang termasuk dalam tempoh masa perintah terhad. Perayu-perayu memfailkan bantahan atas alasan bahawa oleh kerana mereka telah diuruskan oleh Menteri, pembelaan autrefois convict terpakai. Majistret menolak bantahan itu. Perayu membuat rayuan. Isu adalah sama ada pertuduhan ke atas perayu-perayu berdasarkan peristiwa pada 19 Mac 1994 sama seperti mereka dibicarakan semula untuk kesalahan yang sama dan tidak dibenarkan oleh peraturan 'double jeorpardy'.

Diputuskan, menolak rayuan:

(1) Perintah kediaman terhad tidak boleh disamakan dengan perintah penahanan. Begitu juga, perintah terhad tidak menyerupai perintah pemenjaraan dalam ertikata yang relevan. Bagi perintah pemenjaraan menjadi sah, mestilah terdapat sabitan terlebih dahulu, yang memerlukan kepatuhan kepada prasyarat yang ditetapkan dalam Kanun Acara Jenayah (NMB Bab 6) ('Kanun tersebut'). Di bawah s 173(m) Kanun tersebut, sebelum sabitan mesti terdapat penghakiman atau sabitan bersalah dan hukuman. Perintah kediaman terhad tidak mungkin layak dikatakan sebagai sabitan. Jika tiada sabitan direkodkan, isu 'double jeopardy' tidak timbul langsung, seperti dalam kes ini. Selanjutnya, sabitan mesti dibuat oleh mahkamah. Adalah jelas di bawah peruntukan ss 2 dan 6 Kanun tersebut bahawa Menteri bukannya mahkamah jenayah yang kompeten (lihat ms 308G, H, I dan 309A–B, F).

(2) Oleh kerana perayu-perayu tidak boleh dikatakan berada dalam 'double jeopardy', oleh itu mahkamah adalah bebas untuk

meneruskan dan menguruskan pendakwaan. Selain dari itu, adalah mantap bahawa Pendakwa Raya mempunyai budi bicara yang luas untuk memulakan apa-apa pendakwaan memandangkan kuasa yang dikurniakan kepadanya oleh s 376 Kanun tersebut dan perkara 145(3) Perlembagaan Persekutuan. Atas sebab-sebab itu, walaupun perayu dimudaratkan oleh pendakwaan itu, bagi pertuduhan itu, pilihan Pendakwa Raya untuk bertindak terhadap mereka bukannya tindakan arbitrari yang berdasarkan kepada undang-undang diskriminatori. Oleh sebab kuasa Pendakwa Raya yang luas yang dikurniakan kepadanya oleh Perlembagaan, kesensitifan perayu-perayu mesti dianggap kurang penting daripada prerogatif itu (lihat ms 311D–E, G–H).

(3) Undang-undang yang ada berkaitan dengan kuasa Pendakwa Raya untuk bertindak ke atas orang yang melanggar undang-undang, atau begitu juga Akta spesifik di bawah mana perayu-perayu dipertuduhkan bukan berasaskan undang-undang yang diskriminatori. Apa-apa keputusan eksekutif yang diambil bergantung terutamanya kepada bukti yang terdapat dihadapannya atau atas sebab lain. Tidak pernah menjadi pandangan kehakiman bahawa atas sebab kuasa yang meluas yang dikurniakan kepada Pendakwa Raya dan yang mana akhirnya memudaratkan orang yang membuat kesalahan, satu kesan yang berpunca daripada pendakwaan itu, undang-undang itu ditafsirkan sebagai diskriminatori dan oleh itu adalah tidak elok (lihat ms 311I dan 312A, C–D).]

Notes

For cases on autrefois convict, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 536–541.

Cases referred to

Chan Ho Siew v PP [1940] MLJ 274 (refd)
Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors [1985] 2 MLJ 95 (refd)
Datuk Hj Harun bin Hj Idris v PP [1977] 2 MLJ 155 (refd)
Ex parte Mwenya [1960] 1 QB 241 (refd)
Ismail v State Of Orissa AIR 1951 Orissa 86 (refd)
Jamali bin Adnan v PP [1986] 1 MLJ 162 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
Musa bin Salleh v PP [1973] 1 MLJ 16 (refd)
PP v Jamalul Khair [1985] 1 MLJ 316 (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166 (refd)
PP v Teh Cheng Poh [1978] 1 MLJ 68 (refd)
S (An infant) v Recorder of Manchester [1970] 2 WLR 21 (refd)
Yap Chin Hock v Minister of Home Affairs & Anor [1989] 2 CLJ 8607 (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 (refd)

Legislation referred to

Common Gaming Houses Act 1953 s 4A(a)
Courts of Judicature Act 1964
Courts Ordinance 1948
Criminal Procedure Code (FMS Cap 6) ss 2, 6, 173, 302, 376
Federal Constitution art 5, 7(2), 8
Restricted Residence Act 1933 s 2A(i)

Shaari Nor (*Shaari Nor & Co*) for the appellant.
Anselm Fernandis (State Legal Adviser) for the respondent.

Suriyadi J: Three persons, namely Lye Pong Fong, Tan Guan Soo and Sia Kim Yoke were ordered to be restricted in the district of Bidor, pursuant to orders made by the relevant Minister under the Restricted Residence Act 1933 (Act 377) ('the Act'). Section 2A(i) of the Act under which the appellants were detained reads as follows:

> Without prejudice to section 2, the Minister may by order direct that any person named in the order shall be placed under police supervision for any period not exceeding five years and may renew any such order for a further period or periods not exceeding one year at any one time.

The facts alluded to were that they had been involved in activities relating to illegal gambling in Melaka since September 1992 until February 1995. Inspite of those orders having been made, for reasons known to the prosecution, the appellants were charged for carrying out illegal gambling activities on 19 March 1994, offences which could be sentenced under s 4A(a) of the Common Gaming Houses Act 1953, if found guilty. That auspicious date of 19 March 1994 came within the span of period of those restrictive orders when they were supposed to have been active in activities relating to illegal gambling. The charges were filed under Arrest Cases No 83–194–1994 and 83–121–1994 and mentioned before different magistrates. Lye Pong Fong was charged with Sia Kim Yoke in the former case, whilst in the latter, he was charged with Tan Guan Soo. This Lye Pong Fong is the co-husband of these two ladies who were charged with him.

When the two charges came up for hearing at the respective magistrates' court, oral objections were filed by them on the premise that as the appellants had been dealt with by the Minister, the defence of autrefois convict applied. This argument which is provided for under s 302 of the Criminal Procedure Code (FMS Cap 6) ('the Code') and art 7(2) of the Federal Constitution, if accepted by the court, would have meant an immediate withdrawal of the charge or an outright acquittal. Section 302 of the Code reads:

> A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167.

The preliminary objections, much to the chagrin of the appellants, unfortunately were rejected by the respective magistrates, leading to the present appeals. Case No 83–194–1994 was re-registered as Criminal Appeal No 41–13–1997 whilst Case No 83–121–1994 was re-registered as Criminal Appeal No 41–16–1997. Having reviewed the history of both the cases, the parties compromised that the real issue for decision by the court was the solitary legal poser of whether the charging of the appellants based on the incident of 19 March 1994 tantamount to them being tried again for the same offence and disallowed by the rule of double jeopardy.

Encik Shaari for the appellants contended that:

(1) the relevant date in the charges fell squarely within the period of the illegal activities alluded to by the Minister from September 1992 until the early part of 1995 in the restrictive orders;

(2) the Minister was a competent court as he had the relevant powers provided for under the Federal Constitution and the Act;

(3) the effect of the restrictive order was equivalent to an incarceration and therefore the appellants had been sentenced; and

(4) there was discrimination in that that prosecution had the effect of being prejudicial to the appellants.

The Deputy Public Prosecutor on the other hand contended that:

(a) the Minister was not a competent court as defined under s 302 of the Code;

(b) there were no charges meted out by the Minister but merely 'grounds' for the restrictive orders; and

(c) there were no trials or convictions that took place.

As regards the issue of conviction, for analysis purposes, and to ensure an understanding of the sequence of the judicial view and its development, I will begin by stating that a restrictive residence order cannot be equated with that of a detention order (*Ismail v State Of Orissa* AIR 1951 Orissa 86 at p 89). Similarly, a restrictive order cannot constitute an imprisonment order in any relevant sense as no gaoler exist who could control or detain the body of the restrictee. The appellants, as in this case, were quite mobile and there was no physical restraint on them that could be construed as an incarceration or absolute restriction of their personal liberty (*Ex parte Mwenya* [1960] 1 QB 241). For an imprisonment order to be valid, a conviction will have to take place before hand, which undoubtedly entails the fulfilment of all the pre-conditions laid down in the Code. A perusal of the heavily amended s 173 of the Code, in particular s 173(m) as amended by Act 979/97 require certain acts to be done. Under this provision, at the conclusion of the trial, after the prosecution has proved its case beyond reasonable doubt, then only shall the court find the accused guilty and thereafter followed by a conviction and the relevant sentences. The message that comes out from a reading of this provision is that prior to a conviction, inclusive of other legal pre-requisites to be complied with, there should be an adjudication or finding of guilt and sentence (*Chan Ho Siew v PP* [1940] MLJ 274).

A For a conviction to take place for purposes of the Code, such a conviction must be pronounced by a court. Anything less will not suffice. Under Pt II s 6 of the Code, it is promulgated that the courts for the administration of criminal justice in the federation shall be those constituted pursuant to the Constitution, or the Courts of Judicature Act 1964, or by
B the Courts Ordinance 1948, or by any other law for the time being in force. Under s 2 of the Code, a court is to mean the High Court, a sessions court or the court of a magistrate of any class as the context may require. It is crystal clear that by no stretch of the imagination could those provisions include a Minister as a competent criminal court.

C To wind up on this legal point, nearer home it has always been the view that a detention order has never been construed as a conviction for an offence, let alone a restrictive order. Suffian FJ, regarding this matter in *Musa bin Salleh v PP* [1973] 1 MLJ 167 at p 169 had this to say:

> ... Be it noted that a detention order is not a conviction for an offence that
D has been proved against the detainee. If it were, then clearly he could not be detained again on the same facts. On the contrary a detention order is an administrative order; it is not to punish the detainee.

To regurgitate, a restrictive residence order cannot be equated to a detention order, as among others the subject is not incarcerated by any walls or restraint physically by any enforcement officer, albeit restricted within a
E given district. An order of detention entails the aggrieved party being in actual physical custody whilst for a restrictee he is not in detention as ordinarily understood as being confined within a specific area by a will or power exterior to his own. To cap it, a restrictee therefore does not qualify for a right of habeas corpus (*Cheow Siong Chin v Menteri Dalam Negeri,*
F *Malaysia & Ors* [1985] 2 MLJ 95). To take a step further, if a detention order is not a conviction, then surely a restrictive residence order will never qualify. If no conviction has been recorded, then it follows that the issue of double jeopardy does not arise at all, as in the present case.

Even if the subject's personal liberties are curtailed, by reason of the
G fact that the normal criminal and preventive laws are complimentary to each other, the concept of double jeopardy as provided by law are inapplicable here. Abdoolcader J (as he then was) had occasion to comment in *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 at p 285:

> The constitutional protection against double jeopardy embodied in art 7(2)
H of the Constitution and the principle of autrefois acquit and convict enacted in s 302 of the Criminal Procedure Code cannot be applicable as satisfaction under the Ordinance is not a prosecution or trial.

As a follow up to the above prognosis of the law I therefore have to reject the appellants' contention of the applicability of the concept of double
I jeopardy. It is not the established law that preventive laws or the ordinary criminal law be a substitute for the other. To acquiesce to the submission of the appellants would entail the debunking of the complimentary effect of these two sets of law (*Yap Chin Hock v Minister of Home Affairs & Anor* [1989] 2 CLJ 860 at page 869 and *Yeap Hock Seng @ Ah Seng v Minister*

for Home Affairs, Malaysia [1975] 2 MLJ 279 at p 284). On that premise I therefore reject the argument of the appellants that they were tried, convicted sentenced and imprisoned.

A rather sensitive point canvassed by the learned counsel for the appellants was that, his client was prejudiced by the act of the Public Prosecutor by the institution of those charges, considering that they had already suffered sufficiently under the restrictive orders. To resolve this constitutional matter I find it necessary to delve briefly into specific provisions promulgated in our supreme law, ie the Federal Constitution. Under art 8 of the Federal Constitution, all persons are equal before the law and entitled to the equal protection of the law. Even though this article appears to confer equality and equal protection, certain distinguishing factors are required to be considered by me, as that constitutional right is qualified. Suffian LP in *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 at p 170 said:

> The principle underlying art 8 is that a law must operate alike on all persons *under like circumstances*, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... . In my opinion, the law may classify persons ...; the law may classify offences into different categories ... . All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class.

In *The Constitution of Malaysia* by LA Sheridan & Harry E Groves at p 38, the writers wrote:

> Clause (1) does not proclaim that all persons must be treated alike, but that persons in like circumstances must be treated alike. Rational classification is permitted. What constitutes a circumstance entitling the legislature to differentiate between persons or classes of persons and what constitutes unconstitutional discrimination are questions of political values, to be decided by the court.

In *Datuk Hj Harun bin Hj Idris v PP* [1977] 2 MLJ 155 at p 165 regarding art 8, Suffian LP had this to say:

> (1) The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> (2) The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.
>
> (3) ... .
>
> (4) The prohibition applies to both substantive and procedural law.

With that qualified treatment of the equality provision as entrenched in the Constitution established, I need only add that no person shall be deprived of his personal liberty save in accordance with law (art 5 of the Federal Constitution). Under this same Constitution, power is conferred on the Attorney General to institute, conduct or discontinue any proceedings to an offence other than proceedings before a Syariah Court, a native or court-martial. Likewise under s 376 of the Code is found similar provisions.

A For purposes of the touchy question posed by the appellants, the question therefore will rest on the issue whether the Public Prosecutor could do what he did when those charges were preferred against the appellants.

Up to this stage I have shown that:

B (1) there was no conviction as against the appellants;

(2) the restrictive order did not come within the concept of detention let alone an imprisonment; and

(3) the defence of double jeopardy does not apply for matters of this nature.

C With the path clear, as no case as against the appellants had been disposed, and on the assumption that there was credible evidence before the Public Prosecutor to consider, there therefore existed no bar to prefer those charges against the appellants (*PP v Jamalul Khair* [1985] 1 MLJ 316; *S (An infant) v Recorder of Manchester* [1970] 2 WLR 21; see *Jamali bin Adnan v PP* [1986] 1 MLJ 162 regarding 'same offences'). For D completeness, as the appellants had never been convicted or tried for any offences in accordance with the Code, the appellants therefore could not be said to be in double jeopardy. The courts therefore are at liberty to pursue and deal with the prosecution (*PP v Teh Cheng Poh* [1978] 1 MLJ 68). Apart from that, it is trite that the Public Prosecutor has a wide E discretion to institute any prosecution by virtue of the powers conferred on him by s 376 of the Code and art 145(3) of the Federal Constitution. Suffian LP in *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 at p 158 had occasion to say:

> F In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

G On those premises, even though the appellants were prejudiced by that prosecution, as per those charges, the Public Prosecutor's choice to act against them was not an arbitrary action based on discriminatory law. By reason of the prosecutor's wide discretion conferred on him by the Constitution, the ruffled sensitivities of the appellants will have to be H subservient to those prerogatives.

The last question required to be resolved, due to the very nature of the legal poser, will be whether the laws which permitted the Public Prosecutor to charge the appellants are good laws. This legal point is not a new issue and has been sufficiently argued many a time before our superior courts. Due to that, there therefore exists no necessity for me to detail out the I route and eventual views of those courts. Suffice for me to reiterate that the prevailing laws regarding the Public Prosecutor's power to act against a law breaker, or for that matter the specific Act under which the appellants are charged, are not based on laws that are discriminatory. Whatever

executive decision he undertakes will depend in a large way on the available evidence before him or for some other good reasons. Regarding this discriminatory law, permit me to reproduce the remarks of Suffian LP in *Datuk Hj Harun bin Hj Idris*, when he said at p 165:

> With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

It never has been the judicial view that by virtue of the vast powers conferred on the Public Prosecutor and which eventually prejudices a wrongdoer, an effect which flows from that prosecution, that law is construed as discriminatory and therefore bad. With the above explanation the last vestige of the appellants' arguments have been eliminated.

After having considered all these factors I have no hesitation in dismissing the appeals.

Appeal dismissed.

Reported by Jafisah Jaafar